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No. 08-1295

Supreme Court, U.S.
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In The

Supreme Court of the United States

JEFFREY CHEEK AND ALVIN DOTY,

Petitioners,

v.

THE CITY OF EDWARDSVILLE, KANSAS; JOHN BROMAN; JENNIFER BURNETT; TIM KELLY; DOUG SPANGLER; AND LLOYD BETH,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY BRIEF

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REASONS THE PETITION SHOULD BE GRANTED

1. Circuit Split on Free Speech Rights. In their opposition to the petition for writ of certiorari, Respondents tacitly concede the appellate courts have divided over how to apply the job-relatedness limitation on the free-speech rights of public employees announced in *Garcetti v. Ceballos*, 547 U.S. 410, 421-22 (2006). Those divisions continue to fracture the law defining First Amendment protections for government employees. Because of both the importance of those constitutional rights and the disagreements among the lower courts in identifying protected speech since *Garcetti*, this Court should grant the petition to add much needed depth and dimension to the analysis of job-relatedness. Respondents do not dispute the significance of the fundamental constitutional rights implicated here. Nor could they. And they do not suggest review to be unnecessary by showing the lower courts have uniformly interpreted *Garcetti*. Again, they could not. The appellate courts apply *Garcetti* without continuity or even coherence across the circuits. Pet. at 24-26.

Instead, Respondents attempt to trowel over the sound bases for granting the petition with a diffuse rendition of the summary judgment record that simultaneously omits contextually pertinent facts and belabors points largely irrelevant on certiorari. This case actually presents an especially appropriate vehicle for amplification of the standards governing whether a public employee's speech relates to her job

duties in a way that precludes First Amendment protection. The issue was central to the outcome below and, hence, to the questions presented here.

The district court entered summary judgment against Petitioners Cheek and Doty based solely on a determination their speech lacked constitutional protection under *Garcetti* because it ostensibly related to their jobs. App. 35-36. Moreover, the trial court recognized that the factual record would have allowed Cheek and Doty to present their case to a jury under the pre-*Garcetti* analysis of public employee free speech claims. *Cheek v. City of Edwardsville*, 514 F.Supp.2d 1236, 1245-46 (D. Kan. 2007) (decision in companion case). *See also* Pet. at 9 n.3 (*Pickering-Connick* analysis described). The Court of Appeals affirmed simply by rejecting the notion that a public employee automatically receives constitutional protection if she communicates with an outside agency or entity, although Cheek and Doty never relied on that facile argument. App. 6-7. Cheek and Doty actually argued that speech communicated outside the employing governmental unit *typically* receives First Amendment protection and that nothing required a different result in their case. *See Davis v. McKinney*, 518 F.3d 304, 313 (5th Cir. 2008); *Freitag v. Ayers*, 468 F.3d 528, 545 (9th Cir. 2006), *cert. denied*, 549 U.S. 1323 (2007). In short, this case turns on the issue of job-relatedness under *Garcetti*. Moreover, the scenario here – municipal employees communicating as witnesses with investigators from an outside government agency – reflects one of the most extreme

deprivations of First Amendment protection exacted in the name of *Garcetti*. Pet. 14, 26-27. Respondents neither dispute that characterization nor offer any examples to refute it.

2. Respondents Rest on Misdirection. Lacking a compelling rejoinder, Respondents choose to muddle the factual record here. They try to portray Cheek and Doty as having undertaken an official Edwardsville police department investigation into municipal corruption only to then hand off the probe to the Kansas Attorney General's office. But that is incorrect. The Edwardsville police union initially contacted the Edwardsville City Council about the official misfeasance. App. 20-21. As majors in the police department, Cheek and Doty did not belong to the union, and the organization did not represent them. App. 24. When the City Council took no corrective action, two union officials went to the Attorney General's office. App. 20-21. The Attorney General initiated the investigation. App. 12, 21. Cheek and Doty then communicated with those investigators many times. Cheek continued to meet with representatives of the Attorney General's office even after he was fired on May 8, 2006; he gave sworn testimony to the investigators in June.[1] App.

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[1] Cheek testified at what is known as an inquisition. Under state law, the Kansas Attorney General or a local prosecutor may convene an inquisition upon order of a judge to investigate potential crimes. Witnesses can be subpoenaed to appear in a closed meeting – the inquisition – to give sworn testimony to the

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21. Those ongoing contacts reflect the investigators' interest in Cheek as a witness and not merely in his official capacity as a major or acting chief in the Edwardsville police department. Doty had similar communications with the investigators, but did not testify.

Respondents point out that the Edwardsville police department sometimes began criminal or internal affairs investigations only to join with another law enforcement agency to finish the work. But those circumstances are not analogous. For example, as the district court noted, what started as an internal affairs investigation of a subordinate officer eventually was turned over to the Federal Bureau of Investigation with the chief's approval. App. 15-16 (Rogoza matter). At the City Council's insistence, the police department called in a detective from a neighboring municipality to complete an internal affairs investigation of another officer. App. 16 (Marble matter). In this instance, however, the Edwardsville police department had begun no corruption investigation and did not seek outside assistance to do so. Rather, the union representatives – not ranking police department officers – went to the Attorney General to share what they knew in the hope the State would act. Cheek and Doty spoke with the Attorney General's office only after the State had begun its

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prosecutor. *See* K.S.A. 22-3101, et seq. An appearance does not suggest guilty knowledge, but merely knowledge.

investigation. And then they spoke as witnesses, not as coordinating investigators tracking down leads or gathering evidence.

Nothing in *Garcetti* would suggest that a public employee lacks free speech protection when communicating as a witness in an investigation launched by an outside government agency. To the contrary, given this Court's overarching precept that public employees retain First Amendment rights when they engage in speech comparable to that of private citizens, Cheek and Doty should have received constitutional protection here. *See Garcetti*, 547 U.S. at 421-22; *id.* at 423-24. Speaking as a witness is not unique to government service.

As Cheek and Doty noted, Pet. 8, the trial court placed considerable weight on Doty's deposition testimony that he believed as a police officer he had a duty to cooperate with the Attorney General and to oppose the municipal corruption in Edwardsville, App. 34. Respondents repeatedly sound that cry to resist review here. Their argument, however, illustrates nicely the difficulties the *Garcetti* decision cultivated with its truncated discussion of job-relatedness. First, of course, Doty's testimony may be taken to refer to a "duty" in the sense of a moral obligation. *See* Merriam-Webster Collegiate Dictionary, 11th Ed., 2003 ("duty," def. 3b "the force of a moral obligation"). But that is not a duty in the *Garcetti* sense. Rather, a job-related duty entails a task a government employee has been paid to perform. *Garcetti*, 547 U.S. at 22. *See* Merriam-Webster

Collegiate Dictionary ("duty," def. 2a "obligatory tasks, conduct, service, or functions that arise from one's position (as in . . . a group)"). Moreover, Respondents argue that "this duty applied to all police officers and that the police officers had a duty to provide information to the attorney general's investigators if approached." Op. 17. But a blanket duty applied wholesale to government employees reflects precisely the sort of artificially inflated job-relatedness the *Garcetti* majority found unacceptable. *Garcetti*, 547 U.S. at 424 ("We reject, however, the suggestion that employers can restrict employees' rights by creating excessively broad job descriptions."). Respondents then seem to contradict – or at least revise – themselves later by suggesting "a police officer who communicates with the Justice Department or the FBI would enjoy the same constitutional protections as any other citizen." Op. 33. They argue that should be so because state and municipal law enforcement officers do not enforce federal law. *Id.* Thus, according to Respondents, *all* local law enforcement officers have a job duty to cooperate with State criminal investigations but not with federal criminal investigations. An Edwardsville police officer witnessing the abuse of a prisoner would have no constitutional protection for speaking with investigators from the Kansas Attorney General looking into a violation of K.S.A. 21-3425 prohibiting law enforcement officers from mistreating a person involuntarily detained; yet, that officer would be shielded by the First Amendment for talking to FBI agents pursuing a criminal civil rights violation under 18 U.S.C. § 242 based on

the same incident. (And what if representatives of both agencies conducted a single interview as part of a joint investigation?) The *Garcetti* decision does not, to any outward appearance, allocate the free speech rights of public employees with that kind of bureaucratic formalism.

Again, to avoid dealing with the obvious division among the lower courts in applying *Garcetti*, Respondents incorrectly suggest that the job-relatedness of a public employee's speech depends on how that employee acquires the information she disseminates. Op. 22. If the employee learns of the information in the workplace, Respondents argue she enjoys no constitutional protection regardless of how publication occurs. *Id.* They even incorporate that notion into their counterstatement of the question presented. *Id.* at i. Respondents cite *Garcetti*, 547 U.S. at 424, but the decision offers no support. To the contrary, *Garcetti*, fairly read, rejects the argument. The majority cites the facts of *Pickering v. Board of Education of Township High School District*, 391 U.S. 563 (1968), as illustrating protected speech of a public employee. *Garcetti*, 547 U.S. at 423. There a schoolteacher wrote a letter to the editor commenting on an upcoming bond issue vote. The letter plainly included information the teacher acquired directly through his work. *Pickering*, 391 U.S. at 576-77 (letter recounts statements superintendent made to teachers suggesting punitive action against those opposing the bond, observes that few teachers actually supported earlier letters to the editor favoring the bond issue, and

outlining specific deficiencies in one high school that ought to be corrected before the district raises money for athletic fields). *See also Charles v. Grief*, 522 F.3d 508, 513 (5th Cir. 2008) ("To hold that any employee's speech is not protected merely because it concerns facts that he happened to learn while at work would severely undercut First Amendment rights."). Moreover, this Court has recognized that public employees command free speech protection, in part, precisely because their vantage point within the government affords them a particular insight into institutional issues and shortcomings. *Waters v. Churchill*, 411 U.S. 661, 674 (1994). *See also Garcetti*, 547 U.S. at 419-20 (acknowledging the societal benefits of government employee speech of that type).

Respondents repeatedly fall back on the "practical inquiry" phrase drawn from *Garcetti* to bolster their claim that Cheek and Doty acted within their job duties when they recounted what they knew about municipal corruption to the Attorney General's investigators. *Garcetti*, 547 U.S. at 424 ("The proper inquiry [into job-relatedness] is a practical one."). But "practicality" alone fails as a predictive or analytical test; it is more of an empty vessel to be filled as a given court (or advocate) chooses. *Compare Trigillo v. Snyder*, 547 F.3d 826, 829 (7th Cir. 2008) (court invokes "practical inquiry" to reject "core functions" as too narrow a test for job-relatedness under *Garcetti*) *with Marable v. Nitchman*, 511 F.3d 924, 933 n.13 (9th Cir. 2007) (court cites "practical inquiry" to

find chief engineer on ferry had job duty limited to the safety of the boat's mechanical systems).

In short, Respondents' arguments simply sidestep the reasons the petition should be granted. In applying *Garcetti*, the lower courts have opted for differing tests of job-relatedness, meaning the free speech rights of government employees have greater vitality in some places than in others. Measuring those constitutional protections unequally from circuit to circuit and courthouse to courthouse offends sophisticated jurisprudence and plain good sense.

3. Circuit Split Continues to Widen. Since Cheek and Doty filed their petition, the Fifth Circuit has reiterated its view that *Garcetti* "merely carved out a narrow exception" to the traditional analysis of public employee free speech cases. *Rangra v. Brown*, 566 F.3d 515, 523 n.23 (5th Cir. 2009). The Fifth Circuit earlier had decided to look at a public employee's "core" work functions as a means of applying job-relatedness under *Garcetti*. *Davis*, 518 F.3d at 315. The Ninth Circuit also leans toward defining job duties narrowly. *Marable*, 511 F.3d at 933 & n.13. Conversely, the Seventh Circuit has specifically rejected reliance on an employee's "core" duties as too narrow. *Davis v. Cook County*, 534 F.3d 650, 654 (7th Cir. 2008). And the Tenth Circuit aligns with the Seventh by taking a broad view of job-relatedness to strip away free-speech rights. *Brammer-Hoelter v. Twin Peaks Acad.*, 492 F.3d 1192, 1203 (10th Cir. 2007). *See also*, Pet. at 23-25 (discussing circuit division); App. 29-33 (trial court relies heavily

on *Brammer-Hoelter* in entering summary judgment on Cheek and Doty's First Amendment claims).

Again, since Cheek and Doty filed their petition, the Eleventh Circuit issued a split decision denying free speech protection to county employees who told their supervisors the county had failed to properly record and report sewer overflows in violation of the Clean Water Act. *Abdur-Rahman v. Walker*, 567 F.3d 1278 (11th Cir. 2009). The majority adopted a broad interpretation of job-relatedness and implied *Garcetti* held open free speech protection for government employees only as a rare exception. *Id.* at 1285 (The majority opinion rejects measuring constitutional protection by an employee's "everyday job functions" because "[t]he Supreme Court explained that public employees *'retain some possibility of'* constitutional protection when they 'make public statements outside the course of performing their official duties . . . [.]' ") (quoting *Garcetti*, 547 U.S. at 423-24) (emphasis added). The dissent contends the majority "relie[d] on an overly broad reading of *Garcetti* . . . to deny First Amendment protection" to the employees. *Id.* at 1291 (Barkett, J., dissenting).

The Ninth Circuit, however, has since held that a police sergeant reporting misconduct of his colleagues to their supervisors and higher-ranking officials within the department properly averted summary judgment on a claim for violation of his free-speech rights. *Robinson v. York*, 566 F.3d 817, 823-24 (9th Cir. 2009). The trial and appellate courts found the scope of the officer's job duties for *Garcetti* purposes could not be

decided as a matter of law on those facts. *Id.* That result cannot be easily reconciled with *Abdur-Rahman*, the summary judgment entered against Cheek and Doty here, or Respondents' argument imposing on all police officers a *Garcetti* duty to speak as witnesses in internal or external investigations of misconduct. As Cheek and Doty have pointed out, even after *Garcetti*, the courts typically extend free speech protection to public employees communicating with outside government agencies. *Davis*, 518 F.3d at 313 ("external communications are ordinarily not made as an employee, but as a citizen"); *Lindsey v. City of Orrick, Missouri*, 491 F.3d 892, 895, 898 (8th Cir. 2007); *Freitag*, 468 F.3d at 545.

CONCLUSION

This case directly presents the question of how best to determine whether public employees' speech relates to their job duties and, hence, garners free speech protection. This Court deliberately left the question unanswered in *Garcetti*. Some three years later, the need for further guidance on that issue has become apparent. Accordingly, the petition should be granted.

Respectfully submitted,

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